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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Benjamin, Texas)	)	MM Docket No. 01-131

and

In the Matter of	)	
Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Mason, Texas)	)	MM Docket No. 01-133

To: The Commission

APPLICATION FOR REVIEW

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Summary

It defies belief that there was no interaction, directly or indirectly, between Mrs. Drischel or her agents, the party who filed a petition for allotment of an FM channel in remote Quanah, Texas, near the Texas Panhandle, and the major group broadcasters or their agents who filed a massive counterproposal (on which they had been working since 1998) piggybacking on the Quanah petition under the protective umbrella of the Commission's "counterproposal rule" precluding the filing of alternative proposals by other interested members of the public.

The major group broadcasters' massive counterproposal seeks to add four high powered FM channels in the largest radio markets in Texas, one in the Dallas-Fort Worth market (ranked 8th in the nation), one in the San Antonio market (ranked 32nd in the nation) and two in the Austin market (ranked 49th in the nation). In each instance, a small community in the market is designated the community of license in order to enlist a 307(b) preference for first local outlets in an manner that offends rational thought. In two instances, the only local outlets of small communities which lie outside of any major radio markets are to be removed. Moreover, the humongous sixteen-step reallotment scheme, if accepted, would foreclose any opportunity for genuine 307(b) debate vis-a-vis channel allotments sought for other small communities which lie outside major markets, such as the subject rulemaking petitions for Benjamin and Mason, Texas.

Other interested members of the public were blindsided by this maneuver. The massive counterproposal could not have been reasonably foreseen from the public notice **of** the apparent solitary and isolated Quanah petition. The counterproposal does not remotely meet the lawful test that it must be a logical outgrowth of the rulemaking petition and public notice. The Commission's dismissal of the Benjamin and Mason petitions due to conflicts with the counterproposal cannot be sustained under the Administative Procedure Act and related judicial and agency decisions. If they are, then the "counterproposal rule" itself is subject to challenge based on the duty of the agency to consider the efficacy of its regulations and bring them into reason and consonance with lawful requirements.

APPLICATION FOR REVIEW

1. Pursuant to Section **1.115** of the Commission's Rules, Charles Crawford seeks Commission review **of** the Media Bureau's Memorandum Opinion and Order released January **17,** 2003 in MM Docket Nos. 01-131 and 01-133 ("Bureau Decision") denying his Petition for Reconsideration and terminating rulemaking proceedings for allotment of new FM channels at Benjamin and Mason, Texas.

QUESTION PRESENTED

2. The following question is presented: Did Mr. Crawford have reasonable notice under FCC rules and practices that a previously filed petition to allot an FM channel to Quanah, Texas, posed a conflict with his petitions to allot FM channels to Benjamin and/or Mason, Texas?

FACTORS WARRANTING COMMISSION CONSIDERATION

3. Commission consideration of this question is warranted because the rules and practices followed in the circumstances of this case failed to provide a citizen with adequate notice as required by the Administrative Procedure Act ("APA") resulting in agency action that is arbitrary and capricious contrary to law.

ARGUMENT

4. For reasons that follow, Mr. Crawford did not have reasonable notice that the Quanah petition posed a conflict with

his Benjamin and Mason petitions.

A.

The "labyrinthine" trail

5. According to the Bureau Decision, the conflicts between the initial Quanah allotment proposal with Mr. Crawford's Benjamin and Mason allotment proposals were reasonably foreseeable to meet the "logical outgrowth" test applied by the Court of Appeals to determine whether a rulemaking action is based upon adequate notice and opportunity for public participation, citing Weverhaeuser Company v. Costle, 590 F.2d 1011 (D.C.Cir. 1978) and Owensboro on the Air v. United States, 262 F.2d 702 (D.C.Cir. 1958).

6. We shall address these cases and other precedent in more detail shortly. Suffice it to state here that in the Weverhaeuser decision, the Court of Appeals struck down a rulemaking decision that followed a "labyrinthine trail" which was not disclosed in the notice of proposed rulemaking.

7. Quanah, Texas, is located in the northwestern part of the state near the Texas Panhandle. Benjamin, Texas, is located approximately 60 miles south of Quanah. There was no apparent connection between the proposed channel 233C3 at Quanah set forth in the Commission's notice of proposed rulemaking and Mr. Crawford's proposed channel 257C2 at Benjamin.

8. Mason, Texas, is located some 200 miles south of Quanah. There was no apparent connection between the proposed channel 233C2 at Quanah in the rulemaking notice and Mr. Crawford's proposed channel 249C3 at Mason.

9. The Commission's notice of proposed rulemaking identified Marie Drischel residing in Big Creek, Mississippi as the party who filed the petition to commence the rulemaking proceeding regarding Quanah in MM Docket No. 00-148.

10. The Quanah petition did not mention -- and perforce the FCC public notice in MM Docket 00-148 did not mention -- any other community or the fact that for a long time previously, dating back to 1998, a counterproposal had been conceived, developed and prepared -- and was going to be filed on the comment date -- by a group of major broadcasters, i.e., First Broadcasting Company, Next Media Licensing, Inc., Rawhide Radio, L.L.C., Capstar TX L.P. and Clear Channel Licenses, Inc., having interests in many hundreds of radio stations including numerous stations throughout Texas (referred to as the "Joint Parties").

11. **All** Mr. Crawford or any other members of the public knew from the agency's rulemaking public notice was that Ms. Dreschel proposed to allot and file for a new radio station near the Texas Panhandle in Quanah on the channel that she had specified. The trail leading to the conflicts for which Mr. Crawford's proposals have been dismissed was not just something down the road apiece. The labywrinthine trail leading to those conflicts was this:

(a) Step one: The trail begins with a proposal of one of the Joint Parties, First Broadcasting Company, L.P., to move its existing FM channel 248C2 at Durant, Oklahoma, to a small town named Keller, Texas, which is located well in excess of 100

miles from Quanah, Benjamin and/or Mason. Keller is imbedded in the heart of the Dallas-Fort Worth metropolitan area, the nation's sixth largest radio market, for which an upgrade to a fully powered channel 248C is proposed. Joint Parties' Counterproposal at 5-13. This step did not foretell any conflict with Benjamin or Mason.

(b) Step two: In order to do that, a radio station in Archer City, Texas, would have to change from channel 248C1 to channel 230C1. Counterproposal at 13. This step did not foretell any conflict with Benjamin or Mason.

(c) Step three: In order for the Archer City station to do that, a radio station in Seymour, Texas would relinquish its authorized upgrade from a Class A channel to channel 230C2 and change to channel 222C2. Counterproposal at 14. This step did not foretell any conflict with Benjamin or Mason.

(d) Steps four, five and six: In order for the Seymour station to do that, three authorized, but vacant allotments would be changed, one in Seymour, one in Wellington, Texas, and one in in Knox City, Texas. The Joint Parties would use channel 257A for that purpose at Knox City, a conflict with Mr. Crawford's proposal *to* use channel 257 at Benjamin. Counterproposal at **15**.

(e) While the problem regarding Mr. Crawford's Benjamin proposal has now been identified, no self-respecting labyrinthine trail person could stop at this point until he or she determined that the **full** Class C Dallas-Fort Worth market allotment to one **of** the Joint Parties, triggering this potential conflict (step

one), satisfies all other allocation hurdles. If not, there would be no problem for Mr. Crawford to worry about.

(f) To be sure, more allocation hurdles lay ahead. Step seven: In order for the Archer City reallotment to happen (step two), a radio station in Lawton, Oklahoma, would change from channel 231C2 to channel 232C2. Counterproposal at 15. This step reflected an unresolved issue before there would be a conflict with Benjamin and did not foretell any conflict with Mason.

(g) Step eight: In order for the Lawton reallotment to happen, a radio station in Elk City, Oklahoma, would change from channel 232C3 ***to*** 233C3. By now the reader may be wondering -- where is the counterproposal in conflict with the initial Quanah proposal itself, a necessary ingredient in the "counterproposal scheme"? The nexus is found here in step eight, i.e., the change by the Elk City station, also near the Texas Panhandle, up the road a ways from Quanah, from channel 232 to Ms. Dreschel's desired channel 233. Counterproposal at 15-16.

(h) Step nine: Return again to step two, the Archer City reallotment. For that to happen, in addition to the steps already mentioned, a radio station in Healdton, Oklahoma, would move and change its community of license to Purcell, Oklahoma. Counterproposal at **16-18**. This step reflected an unresolved issue relative to the Benjamin conflict and did not foretell the Mason conflict.

(i) Step nine brought the labyrinthine trail to the

brink of a precipice overlooking a regulatory Grand Canyon. Moving the radio station out of Healdton would leave the community without a local outlet, an FCC no-no. This step reflected an unresolved issue relative to the Benjamin conflict and did not foretell the Mason conflict.

(j) Not to worry. Labyrinthine trail blazers are an inventive lot. Enter step ten: a radio station in Ardmore, Oklahoma, would give up its license in that larger community and adopt Healdton as its community of license, a highly unusual 307(b) maneuver which the Joint Parties refer to as "the Ardmore/Healdton" proposal. Counterproposal at 18-19. This step reflected an unresolved issue relative to the Benjamin conflict and did not foretell the Mason conflict.

(k) Step eleven: We must once again return to the Archer City reallotment (step two). In addition to everything we have already referred to, a radio station in Waco, Texas, would downgrade from channel 248C to channel 247C1 and change its community of license to Lakeway, Texas, a small community near Austin, Texas. In the process, the station, owned by Joint Parties' Capstar TX Limited Partnership, would upgrade its commercial location from Waco, the 193rd radio market, to Austin, the 49th radio market. Counterproposal at 19-24. This step reflected an unresolved issue relative to the Benjamin conflict and did not foretell the Mason conflict.

(l) Step twelve: For the Waco/Lakeway changes to occur, a San Antonio radio station would downgrade from channel

247C to 245C1. Counterproposal at 24. This step reflected an unresolved issue relative to the Benjamin conflict and did not foretell the Mason conflict.

(m) Step thirteen. A radio station in Georgetown, Texas, proposes to downgrade from channel 244C1 to 243C2 and change the community of license to Lago Vista, Texas, another small community near Austin, Texas. This would improve the commercial position of the station, owned **by** the Joint Parties' Clear Channel Broadcast Licenses, Inc., as a second move-in to the Austin radio market. Counterproposal at 24-29. This step reflected an unresolved issue relative to the Benjamin conflict and did not foretell the Mason conflict.

(n) Step fourteen: For the Waco/Lakeway/Georgetown changes to occur, a radio station in Llano, Texas, would move its transmitter location and change from channel 242A to channel 297A. Counterproposal at 29. This step reflected an unresolved issue relative to the Benjamin conflict and did not foretell the Mason conflict.

(o) Step fifteen: In order for the Llano reallotment to happen, a radio station in Nolanville, Texas, would change from channel 297A to channel 249A. Counterproposal at 29-30. This step reflected an unresolved issue relative to the Benjamin conflict and did not foretell the Mason conflict.

(p) And, step sixteen: In order for the Nolanville station's channel change to happen, a radio station in McQueeney, Texas, would change its transmitter site and relocate from

McQueeney to Converse, Texas. This was the second precipice overlooking the regulatory grand canyon of an FCC no-no removing the only local outlet for McQueeney, a community located outside any metropolitan area. The choice, here, was a dreadful one that no right-thinking follower of the labyrinthine trail would have anticipated as a legitimate public interest proposal, i.e., removing the only local outlet in favor of awarding -- to one of the Joint Parties who owns the McQueeney station, Rawhide Radio, L.L.C. -- still another high powered FM station in the San Antonio radio market, the nation's 32nd largest. Counterproposal at 30-35.

12. Ergo, Mr. Crawford's Benjamin and Mason proposals are conflicted. Step six of the counterproposal, validated after one follows the trail through step sixteen, proposes channel 257 at Knox City in conflict with channel 257 at Benjamin. The unsavory choice of deleting McQueeney's only station in step sixteen co-opts channel 249 at Mason. The existing transmitter site at McQueeney had cleared the Mason proposal (engineering statement filed with the Mason rulemaking petition, copy attached as Exhibit A). Only when the change in step sixteen to move the station into the San Antonio market is considered does the conflict arise.

13. Attached as Exhibit **B** are maps showing all of the locations involved in the odyssey reflected in steps one through sixteen as well as the locations of Quanah, Benjamin and Mason. In case the reader has lost track, the massive counterproposal,

some three years in the making, would add four new FM stations in major radio markets by major radio players, one in Dallas (sixth largest), one in San Antonio (32nd largest) and two in Austin (49th largest)

E.
Reauirements under the
Administrative Procedure Act

14. The Administrative Procedure Act requires the Commission to publish in the Federal Register notice of a proposed rule in order to allow interested persons to file comments reflecting their interests. 5 U.S.C. **5553**(b)(3). The final rule must be a logical outgrowth of the proposed rule. Unless persons are sufficiently alerted to know whether their interests are at stake, the public notice is unlawful. National Black Media Coalition v. FCC, 791 F.2d 1016, **1023** (2d Cir. 1986).

15. The Bureau Decision at ¶8 would distinguish National Black Media because there, the end result in the rulemaking process, i.e., deciding not to adopt a certain minority preference, was contrary to that set forth in the initiating public notice, i.e., proposing to adopt such **a** minority preference. We don't understand that distinction. Here, the initiating public notice, i.e., to allot an FM channel for a remote small town near the Texas panhandle, was replaced by a blockbuster group allotment, i.e., to serve the Dallas-Fort Worth, San Antonio and Austin radio markets in a massive counterproposal purportedly having a claim to the Quanah petitioner's squatter rights under the Commission's rules and

policies even though the Quanah petitioner had long since withdrawn her petition.

16. The Bureau Decision at ¶8 would distinguish Weverhaeuser Comuanv v. Costle, suura, on the terse one-sentence ground that the EPA based its decision on data and submissions after the record was closed on which the public had no opportunity to comment. That really doesn't explain the Weverhaeuser decision as relevant here. The EPA issued four notices of proposed rulemaking regarding effluent dumping practices of many pulp, paper and paper-board mills but did not cover some aspects of the rules that were ultimately adopted. As to these, the agency engaged in decision-making steps which the court labeled a "labywrinthine trail". The court held that with regard to the matters not covered in the notices, interested citizens such as pulp and paper makers did not have notice and were deprived of their rights under the Administrative Procedure Act. Had they been given notice of the matters in question, they could have taken unfettered comment and reply comment action with the opportunity to protect their interests in the promulgation of rules applicable to their business and affairs.

17. Here, the Commission's notice of proposed rulemaking regarding Quanah made reference to the procedure for filing counterproposals at the beginning of the comment and reply period; thereafter, the Commission issued a supplemental notice regarding the filing of the Joint Parties' counterproposal inviting further comments. But the problem was that the further

comments at that subsequent stage were not unfettered. To the contrary, there were limited to toothless rhetoric since the time for filing the Benjamin and Mason allotment proposals had passed during the initial comment/reply period. Under such a two-stage procedure for FCC allotment rulemaking proceedings, a citizen such as Mr. Crawford had to assess his position only with the Quanah petition before him. As to that, there was no conflict with his Benjamin and Mason proposals and hence he could not have filed a counterproposal even if he had divine prescience to know what was coming and wanted to. To Mr. Crawford and all other members of the public, their interests were measured by what reasonably flowed from the initial public notice; an open-ended risk of exposure to whatever counterproposal might be filed was not reasonable notice; indeed, it was not notice at all.

18. Accordingly, under the Administrative Procedure Act the focus of the notice to Mr. Crawford must be restricted to the nature and content of the originating petition for Quanah. The assessment of Mr. Crawford's relatively low-powered FM allotments at Benjamin and Mason, 60 and 200 miles distant from Quanah, respectively, vis-a-vis the relatively low-powered FM allotment proposed for Quanah, on frequencies that did not interfere with each other, all involving small remote communities, could not have reasonably envisioned the humongous counterproposal of the Joint Parties serving the Dallas-Fort Worth, San Antonio and Austin radio markets with tentacles stretching throughout much of Texas and Oklahoma, including a built-in conflict with Quanah

giving it a lock on the process since Mr. Crawford's proposals involved no conflict to support the filing of his own counterproposal.

19. The Commission wants to protect the orderly administration of the allotment process by precluding parties in the second phase of proceedings **to** advance new allotment proposals in comments on counterproposals that have been filed. Fair enough. But, the Commission is not writing on a clean slate; it has the Administrative Procedure Act to comply with. In order to do that, the Commission has a corollary responsibility to consider only those counterproposals that are reasonably within the ambit of the initial petition as viewed in the eyes of citizens such as Mr. Crawford. Unless notice from the original filing is reasonable, citizens cannot act to protect their interests against an undisclosed counterproposal about to be filed any more than the pulp and paper makers could protect their interests in the rulemaking process with regard to the undisclosed aspects of the regulations about to be promulgated by the EPA.

20. Under the APA, individual rulemakings to allot FM and TV channels must be geographic-based and frequency-based proceedings providing the requisite fair notice to be drawn from the initial proposed allotment. This has been the case in court and Commission common law decisions for decades -- to which we now turn our attention.

21. Owensboro on the Air v. United States, 262 F.2d 702

(D.C.Cir. 1958) involved de-intermixture of the Evansville, Indiana, television market, i.e., a proposal to remove all VHF channels and establish an all-UHF market. The rulemaking notice identified one VHF channel to be removed from Evansville, Indiana, but did not identify another VHF channel to be removed from Hatfield, Indiana, which is located in the Evansville market. Map attached as Exhibit C. Under these circumstances, notice of the de-intermixture proposal alerted interested parties regarding the likelihood of a counterproposal to make an alternative use of the Hatfield VHF channel in another television market, i.e., Louisville. The distance between Evansville and Louisville in this allotment proceeding involving television channels and markets, is approximately 95 miles.[1]

21. Pinewood, South Carolina, 5 FCC Rcd 7609 (1990), involved three communities, Summerville, Sumerton and Pinewood, all in South Carolina. Map attached as Exhibit D. The initial public notice proposed to upgrade an existing Class A FM station to Class C2 status (at Summerville). A counterproposal sought to block this upgrade by using the channel for a first local service (at Sumerton). Another FM channel was available to meet this need while allowing the upgrade at Summerville. The Commission held that a third party could not belatedly seek to use that

[1] The Bureau Decision at ¶8 accurately summarizes the Owensboro holding but does not mention other FCC precedent that has similarly been consistent with the Administrative Procedure Act. We will, since they represent decades of agency common law rulings administering the notice requirements of the APA in the venue of spectrum allotment rulemaking proceedings.

channel to serve Pinewood instead of Sumerton. The distance between Pinewood and Sumerton is approximately **17** miles, both being equidistant in relation to Summerville.

22. Medford and Grants Pass, Oregon, 45 RR2d **359** (1979), cited in the Pinewood decision at ¶8, involved a proposed rule to establish a third commercial television allotment in Medford by deleting the noncommercial reservation of channel 18 there; instead, another channel (12) was assigned to achieve the third commercial allotment and reserved channel 18 was realloted to Grants Pass. The Commission held that interested parties were on notice of the essence of the initial proposal, i.e., to provide a third commercial channel at Medford (the merits of a reserved channel at Grants Pass were not in dispute). The distance between Medford and Grants Pass is approximately 27 miles. Map attached as Exhibit E.

23. Pensacola, Florida, **62** RR2d **535** (MMB 1987), cited in the Pinewood decision at ¶8, involved the Commission's omnibus allotment of nearly **700** new FM channels with regulatory compexities in dealing with counterproposals and petitions for reconsideration not present here. In one of the cases arising from that omnibus proceeding, public notice *of* a petition for reconsideration of a channel change in Pensacola, Florida, but not in Gulf Breeze, Florida, was held to be sufficient notice to a licensee regarding its desire for an upgrade of its station in Chicksaw, Alabama. The distance between Pensacola and Gulf Breeze is ten miles or less, both being equidistant in relation

to Chicksaw. Map attached as Exhibit F.

24. A recent ruling that is also consistent with the Administrative Procudure Act is Toccoa, Sugar Hill. and Lawrenceville. Georgia, 16 FCC Rcd 21191 (MMB 2001), involved a rulemaking proposal in which the owner of a station on a full Class C allotment to Toccoa, Georgia, sought to downgrade to a Class C-1 and move the channel to Sugar Hill, Georgia (near the Atlanta area) and then submitted a counterproposal to change the Class C-l move from Sugar Hill to Lawrenceville, Georgia (also in the Atlanta area). The Bureau questioned whether the Lawrenceville counterproposal met the test of a "logical outgrowth" of the Sugar Hill proposal even though the distance between Lawrenceville and Sugar Hill was only approximately 13 miles, both being equidistant from Toccoa. Map attached as Exhibit G.

25. The Bureau rejected the maneuver in which the petitioner undertook to file a counterproposal to its own proposal, noting the unfairness to other parties in the manipulation of the counterproposal rule cutting off opportunities for submission *of* alternative proposals. If the petition filed by Ms. Dreschel was influenced directly or indirectly by any of the Joint Parties or their agents, the equivalent has taken place here, only worse, i.e., exacerbated by the concealment of that relationship. Whether or not that is the case, allowing the Joint Parties' counterproposal to stand in the shoes of the abandoned proposal of **Ms.** Dreschel cannot be squared

with the Administrative Procedure Act.

26. There is no way -- rationally or legally -- that the Commission's public notice of the Quanah allotment rulemaking proceeding can be deemed **to** apprise the public of alternative allotments across the State of Texas and much of the State of Oklahoma affecting Durant, Oklahoma, Keller, Texas, Archer City, Texas, Seymour, Texas, Wellington, Texas, Knox City, Texas, Lawton, Oklahoma, Elk City, Oklahoma, Healdton, Oklahoma, Ardmore, Oklahoma, Waco, Texas, Lakeway, Texas, San Antonio, Texas, Georgetown, Texas, Llano, Texas, Nolanville, Texas, McQueeny, Texas, Converse, Texas, the nation's sixth largest radio market (Dallas-Fort Worth), the nation's 32nd largest radio market (San Antonio) and the nation's 49th largest radio market (Austin).

C.
Misplaced reliance on three allotment proceedings involving multivle multi-state allotments

27. The Bureau Decision eschews discussion of this line of agency precedent comporting with the requirements of the Administrative Procedure Act and instead, in ¶6 and footnote 6, relies on three Bureau decisions in which large multiple allotments were made including allotments set forth in counterproposals: Farmersville, Texas, et al, 12 FCC Rcd 12056 (MM Bur. 1997); Cross Plains, Texas, et al, **15** FCC Rcd 5506 (MM Bur. 2000); and Ardmore, Alabama, et al, **17** FCC Rcd cited at 18101, correct page at 16332 (MM Bur. 2002). Each will be discussed in turn.

28. In Farmersville, the initial petitioner continued to headline the rulemaking proceeding and secured the allotment for which it had filed. Three sets of counterproposals were filed by other parties and the Bureau sorted out their respective positions making allotments in 12 communities in Texas and three communities in Oklahoma. From the public record, it appears that the parties! interests were resolved to their mutual satisfaction, there was no adversely affected party who sought to litigate the matter following the ruling of the Bureau on a petition for reconsideration (unrelated to the issues here), and to our knowledge the case did not reach the Commission level for review.

29. In Cross Plains, the initial petitioner remained and participated in the proceeding in which counterproposals were filed by three other parties, two of whom proposed alternate allotments conflicting with the petitioner's allotment and during the course of the proceeding following pleadings regarding that matter, the petitioner withdrew. The ultimate result was allotments affecting 36 communities in Oklahoma and Texas. From the public record, it appears that the parties' interests were resolved to their mutual satisfaction, there was no adversely affected party who sought to litigate the matter following issuance of the Bureau's Report and Order, and to our knowledge the case did not reach the Commission level for review.

30. In Ardmore, the initial petition was jointly presented by major group broadcasters (Capstar, Jacor and Clear Channel)

proposing eight allotments, some counterproposals were submitted, and the Bureau sorted things out making a total of 13 allotments in Alabama, Mississippi and Tennessee. A petition for reconsideration is currently pending by two parties to the proceeding raising issues not on point here.

31. None of these Bureau actions purports to relate to or deal with notice requirements under the Administrative Procedure Act. That subject didn't come up. It was not addressed in the Reports and Orders or in the Bureau's decisions disposing of petitions for reconsideration. There was no aggrieved citizen whose APA notice rights were violated or, if they were, the aggrieved party did not raise the issue. These cases are public examples of the fact that multi-party multi-state allotment proceedings may occasionally arise with the concurrence of the participating parties. They do not stand for anything more than that. They do not support any notion that automatic generic APA-sanctioned notices somehow attach to multi-party multi-state counterproposals. They are not part of the agency common law regarding notice requirements in allotment proceedings under the Administrative Procedure Act.

32. When we return to that common law and related court holdings set forth earlier, the 60-mile spacing between Quanah and Benjamin is substantially greater -- and the 200-mile spacing between Quanah and Mason is vastly greater -- than spacings held to be a "logical outgrowth" in the FM allotment holdings in Pinewood (17 miles) and Pensacola Florida (ten miles or less).

In Taccoa, the Bureau did not find a "logical outgrowth" even though the relevant communities were within 13 miles of each other. In allotment proceedings involving television channels and markets, where distances are likely to be greater than in FM, "logical outgrowth" was found in Owensboro involving channel changes in markets 95 miles apart and in Medford and Grants Pass involving channel changes in communities 27 miles apart.

33. The Bureau Decision at ¶7, ignoring agency common law, would wildly broaden the scope of "logical outgrowth" under the APA on simplistic and unanalytical grounds such as citation to the rule that two co-channel full power Class C stations must be separated by 290 kilometers. At issue in another aspect of the Quanah proceeding currently pending before the Bureau -- in which Mr. Crawford has also briefed the APA notice issue -- is the question of whether a petition for the community of Shiner, Texas, 350 miles distant from Quanah, is subject to an APA-sanctioned notice with regard to the Joint Parties' counterproposal. *If* that were true, then there is no reason why the entire breadth of the counterproposal would not be deemed APA-sanctioned as well. This encompasses a spread of some 400 miles, from Elk City, Oklahoma to San Antonio, Texas.

34. Who is the Bureau kidding? For the benefit of the Commission and its staff, if an allotment petition for an FM station in Washington, D.C. is exposed to ABA-sanctioned notice of a potential for conflicting petitions as far away as 400 miles, the exposure would be measured by an arc starting in the

vicinity of Boston, thence to Albany, New York, thence to Cleveland, thence to Lexington, Kentucky, thence to Charlotte, North Carolina, and ending at Charleston, South Carolina.

35. This is much of the entire eastern United States. Section 307(b) principles in FM allotment proceedings are vastly more refined than that and parties who file and prosecute the rulemaking petitions that are essential to implementation of Section 307(b) are entitled to commensurate notice protection under the Administrative Procedure Act. When that is done, based on the agency's history of common law rulings with respect to "logical outgrowth" in allotment rulemaking proceedings, the 60 and 200 mile spacings at issue here do not come close to qualify as APA sanctioned notice under the "logical outgrowth" test. This does not sound the death knell for multi-party multi-state allotment proceedings, which can take place by consensus (as was done in Farmersville and Cross Plains) or can be set forth in the initial petition rather than as counterproposals (as was done in Ardmore). But such comprehensive allotment proceedings, however meritorious, are not above the law and cannot run roughshod over APA notice rights of adversely affected petitioners.

D.

The suspect bona fides of the "counterproposal scheme" employed here

36. The foregoing analysis assumes the bona fides of the Quanah petition and the Joint Parties' counterproposal. However, we can say without rational fear of contradiction that the radio station in Elk City, Oklahoma, near the Texas panhandle, didn't

read the public notice of a proposal to allot channel 233 at Quanah, just down the road, and say, by golly, we would like to have channel 233 rather than 232 in Elk City -- notwithstanding their parity in terms of power and coverage -- and commence to prepare a counterproposal in accordance with its rights under the FCC's counterproposal rule and within the two month timetable specified in the Quanah rulemaking notice.

37. To the contrary, the Joint Parties had contracted with the Elk City station to reimburse it for expenses in making the change from channel 232 to 233 that conflicted with the Quanah petition and had been otherwise working on their project for years dating back to 1998. Piggybacking their massive allotment plan on the singleton Quanah petition as a counterproposal was calculated to gave them squatters rights as the successor in interest to the Quanah petitioner should she subsequently withdraw from the proceeding. That is precisely what happened, in relatively short order, and the cooperating petitioner didn't even ask for any money to go away. Documents attached as Exhibit H.

38. The circumstances obviously and strongly suggest that all of this was not some marvelous coincidence and that there was some communication between the petitioner and the Joint Parties or representatives of the petitioner and the Joint Parties. We raised the matter, the petitioner did not respond, the Joint Parties denied any collusion and the Bureau Decision at ¶9 held that in the absence of any first hand documentation to support

Mr. Crawford's speculation, the FCC would not make further inquiry. Of course Mr. Crawford has no documentation; he has no subpoena power or the equivalent in agency regulatory power. But the Commission does.

39. The Commission's response to the efforts of private attorneys general such as Mr. Crawford that they must provide first hand documentation before FCC will take any action no matter how suspicious the circumstances may be is a tired and depressing one. If the Commission has any interest in protecting the integrity of its allotment rules and policies, it should request copies of any and all documents including correspondence, email and telephone records directly involving the petitioner and the Joint Parties or indirectly involving the petitioner and Joint Parties through attorneys, engineers or other intermediaries. And if anyone declines to produce documents in his, her or its possession -- as the Joint Parties repeatedly refused to provide a copy of a seven figure financial agreement relative to another phase of the Quanah proceeding -- the Commission should invoke the presumption that the documents in the private possession of the respondents would, if produced, be unfavorable to their cause. E.g., Interstate Circuit, Inc. v. U.S. 306 U.S. 208 (1938); Mid-Continent Petroleum Corporation v. Keen, 157 F.2d 310, 315 (9th Cir. **1946)**; Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953 (Rev. Bd. **1988)**

E.
Conclusion

40. Under Federal administrative law, there has to be some

nexus, some setting, some clue as to where the rulemaking proposal is heading and some measure of the metes and bounds of what is under prospective consideration. That is not present here. The obscure, remote, singleton allocation rulemaking notice did not subsume any nexus, any setting, any clue as to where the rulemaking proposal was heading or any measure of the metes and bounds of what was under prospective consideration. If any thing, the Commission's allocation rulemaking notice was deceptive, hiding and obscuring what lay ahead in the counterproposal that had been years in the making. There was no hint that a thousand-pound gorilla had been invited to the dance.

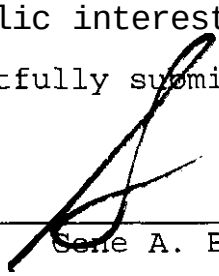
41. If under these circumstances, the Quanah proceeding is held to constitute acceptable notice of the Joint Parties' counterproposal, then there is no limit to the ability of this agency to broaden the scope **of** matters covered within its allocation rulemaking notices. That simply cannot be. The Joint Parties' counterproposal that is a subversion of the agency's counterproposal rule may well destroy it. In another context, the Court of Appeals has held that when the Commission reaches the point of administering a rule or policy that can no longer be sustained as in keeping with its lawful functions, the agency has a duty to re-examine and modify is rule or policy to bring its regulatory modus operandi back in lawful bounds. Bechtel v. FCC, 10 F.3d 875 (D.C.Cir. ***1993).*** The principle of that holding should apply with equal force to the error in giving effect to the counterproposal of the Joint Parties under the circumstances

extant here.

REQUESTED RELIEF

42. It is requested (a) that Bureau Decision be reversed, (b) that Mr. Crawford's petitions for Benjamin and Mason be reinstated with full force and effect vis-a-vis the Joint Parties' counterproposal, (c) that the Commission initiate inquiry addressed to the bona fides of the Quanah petition in relation to the Joint Parties' pre-prepared counterproposal ready for immediate filing on the comment date of the Quanah petition and (d) that the Commission take other corrective action as it may deem appropriate in the public interest.

Respectfully submitted,



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